



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2019/0155

Heard at Belfast Tribunal Centre on 14 October 2019

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Michael Jones
Paul Taylor

Between

Alan McKeown

Appellant

And

Information Commissioners Office

First Respondent

And

Department of Agriculture, Environment and Rural Affairs

Second Respondent

The Appellant was represented by Niamh Horscroft of Counsel

The Information Commissioner was unrepresented

DAERA were represented by Julie Ellison of Counsel

DECISION AND REASONS

INTRODUCTION

1. The Appellant submitted a request for information to the Department of Agriculture, Environment and Rural Affairs (DAERA) on 4 October 2017:

‘I am making a request under the FOI act for a copy of the file covering pollution at my trout hatchery from Jan 2015 to the present day’.

2. DAERA responded on 31 October 2017 and confirmed that it held information falling within the scope of the request but it considered this to be exempt from disclosure on the basis of regulation 12(5)(b) EIR.
3. The Appellant contacted DAERA on 21 December 2017 in order to ask for an internal review of this decision. DAERA informed the Appellant of the outcome of the internal review on 20 June 2018. The review upheld the decision to withhold the information falling within the scope of the request on the basis of regulation 12(5)(b) EIR.
4. Following the completion of the internal review the Appellant contacted the Commissioner on 21 June 2018 in order to complain about DAERA’s decision to withhold the information he requested on the basis of regulation 12(5)(b) EIR.

RELEVANT LEGISLATION

5. The relevant parts of regulation 12 EIR read as follows: -

12.— Exceptions to the duty to disclose environmental information

(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if—

- (a) an exception to disclosure applies under paragraphs (4) or (5); and
- (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

(2) A public authority shall apply a presumption in favour of disclosure.

(3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

(4) ...

(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

...

- (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature”.

DECISION NOTICE AND APPEAL

6. The decision notice is dated 29 March 2019. The Commissioner sets out DAERA’s position as follows: -

(a) The investigation into pollution by DAERA is still ongoing but it was not in a position to send the file to the Public Prosecution Service (PPS).

(b) Therefore, disclosure of the requested information would adversely affect all three elements in reg 12(5)(b) EIR.

(c) With reference to the course of justice element DAERA argued that disclosure ‘would circumvent any future application of the court

procedure rules and weakening or removing any future ability of a judge to impose reporting restrictions, protect the identity of witnesses, hear elements of the case in closed session or rule evidence inadmissible’.

(d) Disclosure could affect a person’s right to a fair trial as the material gathered in the investigation had not been tested in court as to its accuracy or validity and had the status of ‘allegations rather than proven facts’.

(e) The ongoing investigation could be compromised by release of information that would alert potential suspects about lines of enquiry and activities that had aroused suspicion, as well as detection methods, techniques and strategies.

(f) Other investigations could also be jeopardised if the information was disclosed.

7. The Commissioner recorded the Appellant’s response to DAERA’s reliance on reg 12(5)(b) EIR. He argued that no criminal prosecution had been brought in respect of the pollution and he did not believe that any would be issued in the near future. He said that DAERA had ample opportunity to gather evidence and issue proceedings but had failed to do so. The Commissioner concluded as follows in finding that reg 12(5)(b) EIR was engaged, at paragraph 15:-

The Commissioner appreciates the complainant’s position that despite the work undertaken by the DAERA to date, at the point that his request was submitted, no proceedings had been issued. However, in light of the DAERA’s submissions to her, the Commissioner is satisfied that the case may still be referred to the Public Prosecution Service in the future and thus legal proceedings could follow. Furthermore, the Commissioner is satisfied that disclosure of such information would undermine any such legal

proceedings by adversely affecting the ability of a person to receive a fair trial for the reasons set out in the internal review response. The Commissioner is also satisfied that having considered the contents of the investigation file, its disclosure would clearly risk undermining the DAERA's ability to conduct an effective investigation into the cause of the pollution given that it would reveal details of the evidence collected to date, the techniques and methods previously used and strategies for taking the investigation forward.

8. The Commissioner went on to consider the public interest test which, by reg 12(1)(b) EIR needs to be applied even when reg 12(5)(b) EIR is engaged. She accepted the very direct interest that the Appellant has in disclosure and his personal interest in the actions of DAERA being explained, and the wider public interest in understanding the investigatory actions of DAERA. However, she concluded that these were outweighed by the fundamental importance of the general principle of upholding the administration of justice especially when there is an ongoing investigation with a potential prosecution where fair trial rights need to be preserved.
9. The Appellant filed an appeal dated 25 April 2019. He highlighted the fact that there had been three years to bring a prosecution. He said that he had met Mr Irwin from DAERA in November 2017 and that Mr Irwin had pledged to bring proceedings against the alleged polluter within weeks. However, nothing had happened. He says that his business has been 'pushed to the brink of ruin' by the failure to bring a prosecution. He states that DAERA are 'using the excuse that they intend to bring proceedings to prevent me from accessing the information I need' to hold them to account for their lack of action.
10. As well as the information requested, the Appellant would like this Tribunal to place a three-month time limit on DAERA to bring proceedings.

THE HEARING

11. Mr Irwin, a Senior Principal Officer working for the Northern Ireland Environment Agency, provided a witness statement in which he explained some of the investigatory steps that DAERA had taken and some of the difficulties in collecting sufficient evidence for a prosecution of alleged polluters of the Appellant's trout farm. He states that although the Appellant was of the view that the source of the pollution was a series of settlement lagoons from a sand washing plant upstream of the Appellant's fish farms, there were in fact a number of other possible sources for the pollution.
12. Mr Irwin confirms that he met with the Appellant in November 2017 when he told the Appellant that the timescale for providing a case to the PPS was 'a matter of weeks rather than months'. He explains that there were legal difficulties with a planned covert action, and that a further plan formulated in June-August 2018 was postponed when the owner of the sand washing plant fell ill and then died.
13. At the hearing of the appeal Mr Irwin gave evidence and confirmed that there was still an ongoing investigation, although no prosecution was envisaged in the next three months. He said that tens of thousands of pounds had been spent on the investigation, up to a possible £100,000.
14. We read and took into account the witness statements of the Appellant and his wife. The Appellant gave evidence and explained the devastating affect that river pollution had had on his trout farm business, and his frustration that DAERA had not taken any action.
15. We held a short-closed session in which the Tribunal explored the closed material with counsel for DAERA and Mr Irwin as a witness. We were

able to provide a gist of that hearing to the Appellant in open session to the following effect: -

- (a) We considered the test results, photographs and incident reports from DAERA's investigations and clarified that they were relevant to the potential prosecution.
- (b) Mr Irwin provided further details of covert operations carried out by DAERA.
- (c) Mr Irwin re-iterated the point that he had made in his open statement (see above), that there was more than one potential source of pollution which affected the Appellant's trout hatchery.

16. In addition, DAERA provided us with a small bundle of documents which would have been part of the disputed information covered by the Registrar's rule 14(6) direction on 27 September 2019, but which have not been included in the closed bundle.

17. The Appellant's main point in submissions was that the DAERA were wrong to say that there was an ongoing investigation, and that in any event in the circumstances of the case, the balance of the public interest was strongly in favour of disclosure. DAERA's position was that, on Mr Irwin's evidence, there still is an ongoing investigation and that that was certainly the case when the Appellant made his request and it was responded to by DAERA, and therefore the Commissioner's decision notice should be upheld.

DISCUSSION AND DECISION

The application of reg 12(5)(b) EIR

18. We have to decide this case on the position that existed when the request for information was dealt with by DAERA. The latest date for that was the date of internal review on 20 June 2018.
19. The evidence of Mr Irwin was very much that a prosecution was still under consideration at that point, and indeed a plan of action was in place in June 2018, which was subsequently thwarted. As stated above, Mr Irwin explained in his witness evidence and at the hearing the reasons why there had been delay and why the prosecution had not proceeded at the time he had indicated to the Appellant that it would do. In fact, Mr Irwin's evidence was that even at the date of hearing in October 2019 there was an intention to bring proceedings and considerable resources had been devoted to the case.
20. Although there has been considerable delay and even though the situation is very frustrating for the Appellant, we accept Mr Irwin's evidence that the investigation was very active in June 2018 and is still ongoing, with the intention of bringing a prosecution if possible. We find, on the evidence, that DAERA and Mr Irwin are not advancing this as an excuse to avoid providing the Appellant with the information requested.
21. That finding addresses the Appellant's ground of appeal as to why reg 12(5)(b) EIR is not engaged in this case. On the basis on the facts of this case we accept the submissions of DAERA as set out in its skeleton argument that all three limbs of reg 12(5)(b) EIR are engaged as the following would have been adversely affected if the information requested at the time of the internal review in June 2018 had been disclosed:
 - (a) The proper application of court rules and directions by any judge who considers this case in criminal proceedings at some point in the future.

- (b) The ability of persons to receive a fair trial.
- (c) The effectiveness of the ongoing current investigation, and other future investigations, if offenders were able to know in what ways their activity aroused suspicion, what evidence DAERA were attempting to gather, and the detection methods and techniques DAERA use to gather said evidence.

22. These reasons essentially repeat the reasons set out in the Commissioner's decision notice, with which we agree.

Public interest test

23. The exemption in reg 12(5)(b) EIR is subject to a public interest test. We accept that the Appellant has a strong personal interest in understanding the action taken by DAERA in relation to this case. We also think there is a strong public interest in knowing how DAERA carries out investigations and why there can be long delays in decision making when the livelihood of individuals (such as the Appellant) is at stake.

24. However, once it is accepted (as we do) that the investigation was ongoing at the time the Appellant's request was considered, and where a prosecution was the objective, the public interest in protecting DAERA's ability to conduct an investigation and in protecting the integrity of the criminal justice system, including fair trial rights, is very strong.

25. For the same reasons as set out in the Commissioner's decision notice, it is our view that, despite the importance of the case to the Appellant, and the more general public interest in transparency, the overriding need to protect the integrity of the justice system and to ensure fairness for all parties involved in it, is a stronger public interest which justifies the non-disclosure of the information.

26. For these reasons the appeal is dismissed

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 30th October 2019